PROPERTY LAW: 2000-2001

VOLUME TWO

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PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE

A) INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. Professor Jeremy Paul, for example, states that property acts "as protector of individual rights against other citizens and as safeguard against excessive government interference": "The Hidden Structure of Takings Law", (1991) 64 Southern California Law Review 1393. The same point was made many years ago by Morris Cohen, one of the leading legal realists, who argued that private property gives those who have enforceable claims to resources power over their own lives and a measure of power over the lives of others: "Property and Sovereignty", (1927) 13 Cornell Law Quarterly 8.

The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents. But no society places the whole bundle in individual hands, for all recognise that to one degree or another individual property rights must give way to society's collective goals. This is most obviously achieved by taxation, but there are a host of others ways in which this is also done, some of which we have discussed above - see the debate over property and discrimination. The first substantive section of this chapter examines another area where public goals and private rights, or perhaps the private rights of the few and the private rights of the many, collide - takings.

The second section of this chapter examines a somewhat different, but related, aspect of the relationship between property and the state - the extent to which citizens should have some entitlement to a minimum level of property. This introductory note began by talking about property as providing freedom from government interference. But it has long been recognised that this negative liberty is not the only kind of liberty. There is also such a thing as positive liberty, the freedom to live a full life, which may require the state to provide the means to do so. The second substantive section examines how a political theory that stresses "freedom to" might alter current conceptions of the relation between property and the state.

B) FREEDOM FROM: THE LINE BETWEEN REGULATION AND TAKING

THE UNITED STATES CONSTITUTION

The first two "takings" cases are from the USA. The United States Constitution contains a specific protection for property. The fifth amendment reads in part: "...nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". This originally applied only to the federal government, but it was extended to the states, in part explicitly and partly by implication, by the fourteenth amendment (1868). In short, the state may take property from the citizen provided that this is done for a public purpose, such as a highway, and provided fair compensation is paid.

We are not concerned here with the intricacies of the law relating to what a public purpose is or to how compensation is calculated. The Pennsylvania Coal and Keystone cases are about whether the government has taken property at all. If it has not, no compensation need be paid. This may sound like an easy question, but the cases show that it is not. What causes the difficulty is that almost any regulation by government of any aspect of social or economic life will affect in some way the property rights of some person or persons. Anti-pollution laws, for example, limit what uses an owner can make of land and in that sense remove a strand from the owner's bundle of rights. But this is not considered a taking - or at least not generally so, for one can find, in the US in particular, people who say that practically any regulation is a taking.

But assuming that "all regulations are takings" is too extreme a position, it is also the case that most people would agree that the converse - no regulations amount to takings - is also too extreme. This position would state that the government does not "take" from the citizen unless it acquires title to land or personal property. But this would permit the state to prohibit every use, and thereby render ownership worthless, without paying compensation.

So the question in the cases is - where between these two extremes is the line to be drawn? In reading these cases do not be confused by the term "police power". It is a term of art in US constitutional law meaning the power of the states to regulate private conduct in the interests of public health, welfare and safety.

BRITISH AND CANADIAN CONSTITUTIONS

It is well known that neither Britain nor Canada has a constitutional entrenchment of property rights like the United States. Britain does not have a written constitution (as that term is usually understood) at all. The Canadian constitution prior to 1982 dealt with property, but only to assign jurisdiction over it. While there were many who proposed entrenching property rights in the Charter of Rights, this was not done. The Canadian Bill of Rights does contain a protection for property couched in wording very similar to that of the US fifth amendment, but that is not a constitutional document.

None of this means, of course, that private property is not highly valued in the political and constitutional culture of either Britain or Canada. While it is constitutionally possible for governments in either country to seize private property for any purpose and not pay compensation, actually doing so would very likely be deemed politically illegitimate. In fact, there has long been what might be termed a common law entrenchment of property rights, and the rules containing this are discussed in Manitoba Fisheries below. Manitoba Fisheries also examines the question of when regulation becomes a taking, as does the Tener case which follows it.

While the Canadian constitution does not contain a clause entrenching the right to property (other than those pertaining to aboriginal rights), many sections of the Charter do impinge on property law to a greater or lesser degree. The injunction against unreasonable search and seizure, for example, limits the state's ability to enter private property. More importantly for our purposes, the last decade has seen a number of cases in which section 7 has been said to incorporate "economic rights". Some of these are reviewed in Haddock, the last case in the "freedom from" section.

MANITOBA FISHERIES LTD V. THE QUEEN IN RIGHT OF CANADA (1978), 88 D.L.R. (3d) 462 (S.C.C.)

The judgment of the Court was delivered by RITCHIE, J. This is an appeal from a judgment of the Federal Court of Appeal dismissing an appeal from a judgment rendered at trial by Collier, J., whereby he dismissed the action brought by the appellant for a declaration that it was entitled to compensation for the loss suffered by reason of the provisions of the Freshwater Fish Marketing Act, R.S.C. 1970, c. F-13 (hereinafter referred to as "the Act").

The appellant company was incorporated in 1926 and was, from its earliest days until May, 1969, engaged in the purchase of fish from fishermen in the various lakes in Manitoba and the processing and sale of these fish to customers in the United States and in other Provinces in Canada. The learned trial Judge found that this company and others like it had over the years built up individual clientele in what had become a highly competitive business. The following facts are admitted by the respondent:

1. That prior to 1969 the Plaintiff owned and operated a business in the fish exporting industry in Manitoba and that the Plaintiff's business consisted entirely of some or all of the activities described in Section 21 (1) of the ... Act.

discloses no reasonable cause of action. Like the s. 15 claim, it must therefore be struck.

NOTES

1) In Home Orderly Services Ltd v. Government of Manitoba (1987), 49 Man. R. 246 (C.A.) the plaintiff was in the business of providing services to the partially disabled. Many of the recipients of those services had the fees paid by the government. In 1984 the government decided to provide the services itself for free, thereby effectively destroying Home Orderly's business. The company sued for compensation, citing Manitoba Fisheries. The trial court struck out the Statement of Claim as disclosing no cause of action. It stated that the Government was merely providing a competing service, which happened in this case to render the private service completely unprofitable, but it had not prevented Home Orderly from operating. The Court of Appeal upheld this decision, but principally on the ground that Home Orderly had always been substantially dependent on the state for its survival. The Court of Appeal stated that ordinarily the government must compensate for a takeover or the destruction of a private commercial venture.

Are both judgments consistent with Manitoba Fisheries and Tener? Are they in line with the views of the Ontario Court of Appeal in A & L Investments?

2) In Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation et al (1989), 48 M.P.L.R. 41 (Man. Q.B.) the plaintiff operated a commercial bingo hall until regulations made by a licensing commission effectively put it out of business. Compensation for redundant physical assets was paid, but the court rejected a claim for loss of business. Following Home Orderly, above, the court stated that while compensation would be ordered when government destroyed or damaged private enterprise, this was a case where the enterprise only operated at the sufferance of the government which had the right to set licensing terms.

3) In 1980 The City of Winnipeg designated the Fort Garry Hotel as an historic building. In 1983 the city refused a request from the hotel's owner for it to be delisted. Listing, among other things, prevented demolition of the building and limited the alterations that could be made to it. After years of losses, the owners sued for compensation for loss of value of land and losses incurred in the running of the hotel. The court, in Harvard Investments Ltd. v. City of Winnipeg (1994), 54 L.C.R. 163 (Man. Q.B.), summarised one of the owner's arguments thus: "The listing, Harvard argued, was tantamount to an expropriation in that it deprived Harvard of certain of its rights of property and ownership to the hotel by converting such rights and ownership to the City. An example of such deprivation ... was the right to demolish the hotel". The trial court's response

to this argument was as follows:

"The listing ... was not a statutory or regulatory taking as such. It did not deprive the owner ... of its title to and possession of the land. It did, however, prevent the owner ... from doing with the hotel building as it saw fit.... While this may be, as Harvard argued, an effective deprivation comparable to a taking of the owner's equity in the land, it is not, in my opinion, compensable.... I am in agreement with the City's position that the listing and designation of the hotel was merely an exercise of a regulatory power similar to the regulation of the use of lands through a zoning by-law. While it may have the effect of limiting and curtailing the use of the lands, it does not amount to a taking nor does it vest any rights to the property in the City".

Harvard appealed. Two judgments were written in the Court of Appeal. Philp JA, for himself and Kroft JA, stated that: "There was a 'taking away' when the hotel was listed ..., in that the effect of the listing was to preserve in perpetuity the exterior of the hotel and certain described interior elements. But there was evidence that the listing, and the hotel's historic elegance which the listing preserved, were a marketing tool of some significance to the hotel's operation. And ... the City acquired nothing; nothing was added to the value of public property". As a result, listing was "akin to the limitations that zoning and planning regulations may impose upon a property." Philp JA cited Tener for the proposition that to constitute a taking action short of expropriation of title must add value to public property.

Having rejected Harvard's claim, Philp JA nonetheless went on to make some general comments. He stated that he was not holding that an historic listing "will never give rise to a claim for damages". That is, if a listed building "becomes commercially impracticable" either because of the listing, or as a result of a combination of that listing and other factors, such facts "may amount to a taking and entitle an owner to compensation".

Twaddle JA delivered a separate concurring opinion. He began by noting that in both Manitoba Fisheries and Tener the Supreme Court had approved the De Keyser's rule, and had also "offered guidance as to what constitutes a taking". He thought this guidance was that there were "two elements to a taking". First, "the acquisition of an asset by the authority involved", and, second, "the complete extinguishment of an asset's value to the owner". Neither of these elements was present in the case before him. First, the hotel was put out of business more by mismanagement than by the historic designation, and the city had not acquired the hotel. Twaddle JA then went on to say that "if an owner is deprived of the right to demolish a building by reason its historical designation, the owner may well have a claim for compensation. It would, however, be necessary for the owner to establish the building to be virtually useless ... and its value thus completely extinguished". In these circumstances the first of his two elements would also be met: "if such circumstances had been proved to exist, my own view is that a notional taking could be deemed to exist as the city would have preserved a monument for the benefit of its citizens at the cost of a private owner. That would be particularly so where, as in this case, the city subsequently acquired the property on a tax sale. It could then be said that the tax sale, and the city's acquisition of the property, flowed from the historical designation which reduced the value of the

property to nil and made the payment of real property taxes pointless. Conceptually, then, I see the historical designation of a building as having the potential of being an expropriation, but only in the most limited of circumstances".

4) Twaddle J.A.'s statement in Harvard Investments that "the complete extinguishment of the asset's value to the owner" could constitute a taking was refuted by Cromwell J.A. in Attorney General of Nova Scotia v. Mariner Real Estate Limited et al (1999), 177 D.L.R. (4th) 696 (N.S.C.A.). He asserted that neither Manitoba Fisheries nor Tener suported this conclusion, because in neither case was it the loss of economic value that triggered a finding of a taking, but the fact that the regulations respectively prevented the company from carrying on business at all and denied all access to the minerals. It may be, he went, that "the distinction between the value of land and interests in land is, in one sense, highly technical", but it was nonetheless a fundamental one.

5) Review the problem on page 18 of chapter 1. Add these facts:

These incidents increased public awareness of the problem of homelessness in Toronto and led the government to strike a task force on the problem. Composed of a broad cross-section of social groups, the task force issued a final report with a number of quite radical recommendations. Among the report's recommendations was that until the government could provide sufficient publicly run shelters, it should have the power to require private owners of certain types of commercial premises to allow their premises to be used as temporary shelters for homeless people during non-business hours in the winter months. Although persuaded that this recommendation would never become law, Aalto and other downtown property owners have hired a consultant to lobby against the task force report.

What legal arguments could Aalto and the other property owners make against the implementation of the task force recommendation?

6) Remember that in chapter two we looked at arguments that the courts should find that there were property rights in certain intangibles not previously recognised as conferring such rights: see Caratun et al. The following article from the Globe and Mail, 24 March 1998, by Terence Corcoran (obviously) deals with the relationship between the creation of new property rights and possible claims for compensation for expropriation:

At the Great Canadian Superstore in Langley, B.C., the recent price of four litres of 2% milk was $3.69. Across the U.S. border in Blaine, Wash., the Canadian dollar equivalent price was $2.60. The milk price gap, a 40% premium paid by Canadians, is the final insult of the great consumer ripoff known as the national supply management system, an elaborate structure of controls, regulations, quotas, and back-room deal making that Ottawa maintains to limit the supply of agricultural output and keep prices high. Under supply management, protected by import restrictions and high tariffs, Canadians pay billions of dollars more each year for scores of products, from cheese to chickens and eggs, with the money flowing mostly from consumers to farmers. Now, behind the scenes, an even more twisted distortion is developing, one that could cost consumers and taxpayers billions.

As the prospect of ending supply management grows under pressures created by international trade agreements, farmers are likely to begin claiming compensation for their losses. "The effect of supply management has been to create a set of property rights related to the ownership of quota", University of British Columbia professor William Stanbury said in a paper on a looming property rights debacle in the supply management sectors. Quota is the right to sell a farm product such as milk through a supply management board. In milk alone, Prof. Stanbury calculates that at current prices for quota - the amount of money a farmer must pay to purchase the right to produce a quantity of milk - the potential total value of "property rights" claims by farmers could exceed $11 billion. The Stanbury paper was one of more than a dozen delivered over the past weekend at a conference put on by the Canadian Property Rights Research Institute, a Calgary organization dedicated to championing property rights across Canada. For the most part, property rights activists focus on how governments take away property rights. Other papers examined how rights have been systematically diminished, with case studies on Ontario's rent control regime, the Canadian Wheat Board, the environment, intellectual property, and gun control.

Prof. Stanbury's paper tackled the opposite, but no less alarming problem of how governments create artificial property rights by regulation, and then how the owners of those rights are likely to claim compensation if the rights are removed. In farm product supply management, the value of these rights - essentially the right to gouge consumers - has skyrocketed. The milk quota is the right to produce one kilogram of butter fat daily. The latest March price for quota traded on the Dairy Farmers of Ontario quota exchange was $16,501. Lower prices exist in Manitoba and the western provinces.... Using national averages, Prof. Stanbury calculates that ... the total value of the milk quotas is $11.8 billion. The numbers are staggering.
On a per cow basis (there are about 1.1 million in the country), the value of quota is $10,161. This compares with the value of cows, about $1,000 each.

On a per farm basis (average 49 cows for each farm), the value of quota is about $497,000. At that price, the value of quota is about equal to the average cost of the land, buildings, equipment and cows for an average 49 cow operation. The value of quota has fluctuated widely over the past two decades, but a recent analysis of price performance shows that milk quotas have outperformed the Toronto Stock Exchange composite index.... The quota values have real consequences. Banks grant farmers loans secured by quota. Farmers and investors have real money at stake. The result is the creation of what Prof. Stanbury describes as a "form of property rights" that now has large economic value, and an army of "owners" with a strong interest in lobbying government to maintain and protect those rights. "If supply management were abolished and all tariffs and quotas were removed, the investment in quota would disappear." The question posed by Prof. Stanbury is whether these rights should be protected: "What is an ethical approach to the economic value of property rights or quotas created by government at the behest of a narrow interest group, and which are owned by the members of the group?" He doesn't provide an answer. It shouldn't be too difficult, however, to see that there are no true property rights to protect here. Ethically, as well as economically, supply management is a cartel put in place by government to restrict supply and rob consumers to pay the farmers. Removing the system would restore the market rights of consumers, which have been appropriated by the cartel for the past 25 years.

(C) FREEDOM TO: PROPERTY AND WELFARE

In the introduction to this chapter it was suggested that another way of looking at the relationship between "freedom", property and the state was to conceive of a positive right to a minimal level of property, of resources. As the London Borough of Southwark case immediately below demonstrates, this is not a concept that finds any support in the common law. There the rights of those who already own property are paramount.

There have been suggestions that section 7 of the Charter can provide at least some degree of protection for minimal rights, although these appear principally in the academic literature, not in judicial decisions: see M. Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims' 19 Queen's L. J. 65 and "The Protection of Welfare Rights under the Charter" 20 Ottawa L. R. 257. The last case in this chapter is one of very few judicial hints that the Charter might be interpreted in this way. Those who argued for the inclusion of a "social charter" in the constitution at the time of the Charlottetown accord were, of course, seeking this kind of guarantee in an explicit form.

LONDON BOROUGH OF SOUTHWARK v. WILLIAMS AND ANOTHER, [1971] 2 All E.R. 175 (C.A.)

LORD DENNING MR. This case arises out of the extreme housing shortage in London. In September 1970 some people who were homeless and others who were living in bad conditions sought the assistance of a squatter's association. They made an orderly entry into some empty houses in the Borough of Southwark which were owned by the council. They squatted there. The council applied to the court.... The squatters here admit that they have no title to these houses. They admit that the houses belong to the council. But they seek to justify or excuse their action on the ground that it is the duty of the council to provide temporary accommodation for persons who are in need thereof: and that it was of necessity that they entered the houses.

I would first tell how these houses have become empty. Under the Housing Act 1957 it is the duty of a local authority, such as the Borough of Southwark, to consider the housing conditions in their district. In order to relieve the need, it may provide housing accommodation by building houses, converting others, acquiring houses, pulling them down, or repairing them. This has been done on a large scale in the Borough of Southwark. The council have proclaimed development areas which it means to develop so as to accommodate many more people than have hitherto been there. As and when houses have become empty, it has bought them from their owners. If they are capable of repair at a reasonable cost, the council has repaired them. If they are incapable of repair at a reasonable cost, the council has boarded them up until the time comes when they can be pulled down and new houses erected in their stead. The council has a housing list which it keeps for those in need. There are nearly 9,000 persons on the waiting list now. Nearly half of those are people who are overcrowded and at least one bedroom short. Some have occupants who are ill and sick; and should be moved for health reasons. Others are young couples who have no home of their own. All these are waiting their turn. The council feel that others should not get priority by 'squatting' in the empty houses. Each should take his turn in the queue.

Now let me turn to the squatters themselves. Everyone has the greatest sympathy for them. Two cases are taken as representative. One is the defendant Mr Peter Williams. He is a married man with two children - one aged five years and the other five months. Up to the end of August 1970 he and his family were living in Deal as boarders in a house;

CHAPTER NINE

ABORIGINAL RIGHTS

A) INTRODUCTION

This chapter provides a necessarily brief introduction to the subject of aboriginal rights in land. The issue of aboriginal rights has in the last two decades become an increasingly important legal and political one in Canada; it has also received much attention in recent years in the courts and legislatures of Australia and New Zealand and, to a lesser extent, in the USA.

The chapter begins with a review of the leading aboriginal rights cases from the 1970s and 1980s, which are about the common law of aboriginal title. The next section looks at aboriginal rights, including aboriginal rights to the use of land, in the context of the entrenchment of aboriginal rights in section 35 of the Constitution. Since that entrenchment the topic of aboriginal rights has become a constitutional issue as well as a matter of "property" law, and therefore it is discussed in both the constitutional and property courses. Section (d) of the chapter brings together the issues of aboriginal title and s. 35 (1) of the Constitution through a detailed examination of the Delgamuukw case. We conclude with looking at the intersection of aboriginal rights in land with other common law property regimes.

Before reading the cases, three general points should be borne in mind.

First, the nature and extent of aboriginal rights described here are the rights recognized by the Canadian legal system. This is not necessarily the set of rights to which the indigenous peoples themselves claim to be entitled.

Second, aboriginal rights are legally enforceable in the same sense as any other legally recognised right is enforceable, against both the State, and other residents within the State. They are rights which the indigenous peoples possess which are not possessed, and cannot be possessed, by non-native persons within the State.

Third, in this chapter the term aboriginal rights does not refer to treaty rights. The rights discussed here arise independent of any treaty.

B) ABORIGINAL TITLE AND ABORIGINAL RIGHTS AT COMMON LAW: THE PRE-SECTION 35 CASES

A short description of aboriginal title would go as follows:

i) The absolute, or "radical", title to all land within the state, including land over which any aboriginal title or right may exist, belongs to the Crown. This "radical" title is the ultimate Crown title out of which the estates which we have studied are carved.

ii) Aboriginal title is a burden on this radical or absolute title, giving aboriginal peoples rights in the land.

iii) Having stated proposition (ii), it is difficult to say precisely what aboriginal title is. It is not an estate held in tenure from the Crown. It is not a purely personal "usufruct" interest (a right of use) held by individual aboriginal people. To this point the most detailed assessment of what aboriginal title is comes in the Delgamuukw case, reproduced below. The early cases discussed in this section give you very little sense of the content of aboriginal title.

iv) Whatever it is, aboriginal title is one form of aboriginal right. It represents "the way in which the common law recognizes aboriginal land rights". That is, "aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land": R. v. Van der Peet, reproduced below. In this definition, therefore, "aboriginal rights" is a general term, and "aboriginal title" is a specific instance of an aboriginal right. We will see a little later that "aboriginal rights" is, confusingly, also a term that refers to specific rights, less than "title" - for example, a right to hunt or to fish.

CALDER ET AL v. ATTORNEY-GENERAL OF BRITISH COLUMBIA (1973), 34 D.L.R. (3d) 145 (S.C.C.)

Calder is the first modern case in which the Supreme Court of Canada recognised the existence of aboriginal rights in land arising at common law: that is, independently of any treaty of legislative enactment. In Calder the issue was whether the Nishga people of British Columbia possessed aboriginal rights to their traditional lands in the Naas River Valley. The litigants were, of course, the same Nishga people whose treaty with the crown is the subject of so much current debate in British Columbia.

The action was dismissed at trial, and the Court of Appeal rejected the appeal. The Supreme Court of Canada split three-three, with the seventh member of the Court, Pigeon J., expressing no opinion on the substantive issues and holding against the Nishgas on a procedural ground. Judson J., Martland and Ritchie JJ concurring, first noted that there were two "sources" for aboriginal

ABORIGINAL TITLE AFTER CALDER

Calder is now seen as the first modern case establishing the existence of an aboriginal title, even though at the time only a minority of the judges clearly accepted this notion. As Calder demonstrates, the question of the existence of an aboriginal title and/or aboriginal rights is adjudicated on the basis of occupation and use at the time of the assertion of sovereignty. The aboriginal right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. Thus the content of aboriginal rights may vary from case to case; aboriginal rights are fact and site specific. The nature and content of the right, and the area within which the right was exercised, are questions of fact. Two cases litigated between Calder (1973) and Sparrow (1991, reproduced below) have proved important in the development of the law.

First, in Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979), 107 D.L.R.(3d) 513 (F.C.T.D), Mahoney J. considered a claim by the Inuit inhabitants of the eastern Arctic that their lands in the Baker Lake area were subject to their rights to hunt and fish. They also asked for an order restraining the government from issuing land use permits, prospecting permits, and mining leases, and from recording mining claims which would allow mining activities in the area, and an order stopping the mining companies' operations. The court heard the testimony of two leading archaeologists who had worked in the area. They gave evidence of occupation and activity in the area during the "pre-historic" period (starting 45,000 years ago) and the historic period (from 1610), including carbon dating of artifacts discovered. They also gave evidence that Chipewayn Indians moved north at some point and hunted on the more southerly lands of the area claimed. The court also reviewed documentary evidence about European penetration, including the timing of settlement. There was also testimony from Innuit witnesses regarding their personal recollection of the Innuit way of life before and after settlement in the town of Baker Lake itself. This was supplemented by evidence produced through an extensive series of interviews with the resident Innuit regarding the contemporary Baker Lake Innuit community; attention was paid to the importance of hunting caribou and fishing to the community's survival.

Mahoney J. held that Calder provided "solid authority for the general proposition that the law of Canada recognises the existence of an aboriginal title independent of the Royal Proclamation or any other prerogative act or legislation. It arises at common law". He also stated that aboriginal title arose from the fact that when the settlers came, "the aboriginal people were already there, organized in societies and occupying the land as their forefathers had done for centuries." These facts are used as the basis for aboriginal rights and title. Mahoney J. then turned to how one determines whether there is aboriginal title in a particular case. He laid down four requirements to be met:

1. That the plaintiffs and their ancestors were members of an organized society;

2. That the organized society occupied the specific territory over which the Aboriginal title is asserted;

3. That the occupation was to the exclusion of other organized societies;

4. That the occupation was an established fact at the time sovereignty was asserted by England.

All of these requirements were met in the Baker Lake case. The court held that the first did not require "proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent to the territory". The Innuit did have an organized society, organized to exploit the resources available and essential to human life; it was not an "elaborate" society, for all they could do was hunt and fish and survive, and therefore their aboriginal title "encompasses only the right to hunt and fish as their ancestors did." The second requirement, that of occupation, was also met. Mahoney J. stated that the nature, extent or degree of physical presence on the land required is to be determined in each case by a subjective test. The Inuit would have occupied the lands in ways different from Indian societies to the south, particularly as there was for the most part no pressure or competition from other groups. Moreover, "the exigencies of survival dictated the sparse, but wide-ranging, nature of their occupation". That is, "To the extent that human beings were capable of surviving on barren lands, the Inuit were there: to the extent that the barrens lent themselves to human occupation, the Innuit occupied them." The third requirement, exclusivity, led to a mixed result. On the basis of archaeological and historical evidence the court found that the boundary between the Inuit and the Indian land to the south was inside the Baker Lake area claimed by the Inuit. The result was that Mahoney J. excluded some southerly portions of the land claimed because the Chipewayn Indians had used the land as well as the Inuit. On the fourth requirement, Mahoney J. found that "at the time of England asserted sovereignty over the barren lands west of Hudson Bay the Inuit were the exclusive occupants" of a particular portion of the territory.

Thus "an aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit" as of the time of the assertion of sovereignty.

The Baker Lake test has been cited often, but is now subject to at least two qualifications. First, doubt has been cast on the third requirement - that of exclusivity - in a claim for aboriginal title. In any event, there is likely no need for exclusivity if the claim is for some particular right - such as a right to hunt - rather than for aboriginal title. Second, as the Sparrow, Van der Peet and Gladstone cases discussed below demonstrate, the Supreme Court has also added the requirement that to be an aboriginal right an historical practice must be "an integral part" of the "distinctive culture" of the people in question.

Baker Lake also discussed the nature of an "aboriginal title". Here Mahoney J. noted that "Canadian courts have ... successfully avoided the necessity of defining just what an aboriginal

title is". One thing that was clear, however, is that it "was not a proprietary right".

The second important case is Guerin v. The Queen, reproduced in the Constitutional Law casebook.

CHAPTER TEN

INTRODUCTION TO LANDLORD AND TENANT LAW:

THE NATURE OF THE LEASEHOLD RELATIONSHIP

A) INTRODUCTION

The principal characteristic of the landlord-tenant relationship at common law is that the leasehold interest is conceived of as an estate in land. While the relationship of landlord and tenant is created by contract, the relationship itself is not a contractual but a property relationship. In this sense it is the same as the relationship between a buyer and seller of land; they may contract to buy and sell, but once they have done so they are not in a continual contractual relationship that may modified by negotiation or even breached. The buyer has an estate and can exclude the seller; dealings between the two are at an end.

So too in the classical conception of the leasehold estate. Once the tenant has the lease he or she has an estate and the absolute right to exclusive possession against all the world, including the landlord, for so long as the term of the lease provides. All the landlord has is the reversion - the right to retake possession and full rights when the tenant's estate is at an end.

The landlord-tenant relationship is thus a relationship created by contract, express or implied, in which a person with an interest in real property - the landlord or lessor - grants a lesser interest in that property to the tenant or lessee. The technical term for lease is demise, and the leased land is often referred to as the "demised premises". The lesser interest demised is that of exclusive possession of land for a definite or potentially definite period of time. A leasehold estate cannot be of uncertain duration.

The remainder of this chapter expands on the point that a lease confers an estate in land, not merely certain contractual rights and obligations, by examining the distinction between leases and licences, the doctrine of the independence of covenants, and the legal consequences that flow from physical abandonment of the demised premises by the tenant.

This chapter deals with the common law of landlord and tenant. The common law has now been superseded in the area of residential tenancies by statutory reform. Only minor statutory changes have affected non-residential tenancies, which are therefore still largely governed by traditional common law principles. Thus the principles of law discussed in this chapter and the next concern commercial, or non-residential, tenancies only.

B) LEASES AND LICENCES

It is one thing to say that a lease is the grant of a leasehold estate, but knowing that will not tell you whether a particular agreement constitutes a lease or some other arrangement between the parties over use of land. The most common "other" legal form to an alleged lease is a licence, which is simply permission to use land for some purpose. If you let somebody park in your driveway, for example, you have granted them only a licence. Knowing which of the two has been created in any agreement is often vital, for at common law a licence is revocable at any time by the licensor. [Equity will enforce a contractual licence, one in which consideration has been paid, but even then it is effectively revocable provided damages are paid.]

An obvious example of an agreement that could be a lease or a licence, and of the importance that flows from deciding which is involved, comes from thinking of a superintendent in an apartment building. He or she works for the owner and usually lives in one of the apartments. If the agreement to occupy the apartment was construed as being only a licence, as but one term of many in the contract of employment and given in order to make it easier to carry out the terms of employment, the superintendent would have no legal protection outside any terms contained in the licence, the contract. If the same agreement to occupy was seen as a lease, and therefore completely independent of the employment relationship, the superintendent could claim whatever protection the jurisdiction's legal regime chose to give to tenants, whether or not he or she continued to work for the owner. As it happens, this situation is largely covered by a provision of the Tenant Protection Act in Ontario, but the example should help to point up the significance of the lease/licence distinction.

However, stating which consequences flow from whether an agreement for the occupation of land is a lease or a licence is easier than deciding whether that agreement is a lease or a licence. Indeed, this can be quite a difficult question. If an agreement is uncertain as to duration, it will be a licence. But certainty of duration is only a necessary, not a sufficient condition, for a lease. Beyond that, the cases reveal two approaches to deciding whether a particular agreement is a lease. One line of cases states that if the agreement grants, or intends to grant, exclusive possession for a fixed time it is a lease. That is, the only thing that matters is whether the right to exclusive possession has been granted. If it has, the agreement is a lease and grants an estate, whether or not it uses the word licence 100 times. Another, more recent, line of cases suggests that it is the intention of the parties that matters; if they intend to be landlord and tenant, then the court will give effect to that intention. Thus a document that looks like a licence can be held to be a lease because of its language, so that exclusive possession is granted to the lessee irrespective of what the document says. Conversely, by this approach a document that grants exclusive possession for a term can be held to be a licence because the parties call it a licence.

The two cases excerpted below represent these two approaches, although you may not find it easy to distinguish between them. One complicating factor is that both agreements creating licences and leases invariably contain a variety of ancillary terms, relating to matters beyond the simple question of the right to occupy the land. These terms will be characterised as contractual terms

if the agreement is held to be a licence, or what are called covenants if it is a lease. The ancillary terms often serve to limit the tenant's rights of exclusion, as they do in each of the two cases below. One might be tempted to say that any such limit means that exclusive possession has not been granted. Alternatively and conversely (or perhaps perversely) one might be able to say that such limits are the work of the tenant, and therefore an exercise of his or her rights of exclusive possession.

RE BRITISH AMERICAN OIL CO LTD AND DEPASS (1959), 21 D.L.R. (2d) 110 (Ont C.A.)

SCHROEDER J.A. On September 3, 1959, the appellant, the British American Oil Co. Ltd., as landlord, made application to His Honour Judge Macdonell in the County Court in the County of York for an order for a writ of possession directed to the Sheriff of the County of York, directing that official forthwith to place the applicant in possession of the service station premises located at 120 Fleet St. in the City of Toronto, which said premises were more particularly described in a lease entered into between the applicant as landlord and Jack Halpert as tenant on February 6, 1959. On the same date a similar application was made for an order for a writ of possession with respect to service station premises located at 929 Queen St. East in the City of Toronto, and more particularly described in a certain lease entered into between the applicant as landlord and the respondent, Richard DePass, as tenant, on February 6, 1959. The grounds of the said applications were that the leases entered into between the parties had been validly determined as of August 24, 1959, by service of a notice to quit dated July 25, 1959, given by the landlord pursuant to the terms of the said leases. It was alleged that the tenants, having wrongfully refused to go out of possession, were overholding tenants without permission of the landlord or right to possession or occupancy, and that they wrongfully held possession against the landlord. Each of the said applications was dismissed with costs. From these two orders British American Oil Co. now appeals....

On February 6, 1959, the parties signed a document described as a service station lease, and on the same date they signed a separate agreement described as an "equipment loan and retail dealer sales agreement". Both respondents are described in the former instrument as "tenant". It was provided in the leases that in consideration of the rents, covenants and agreements thereinafter reserved on the part of the tenant to be paid, kept, observed and performed, the British American Oil Co. did demise and lease unto the tenant the lands and premises therein described, followed by a habendum clause in the terms following: "To have and to hold the said premises for the term of one month to commence on the 1st January, 1959, and end on the 31st January, 1959, subject to earlier termination as herein provided." It was further stipulated that the leases should "automatically renew" themselves on the same terms and conditions (including this particular provision for automatic renewal) unless written notice of termination was given by either party to the other at least 30 days prior to the expiration of the term or any renewal thereof, or unless the lease or any renewal thereof had been terminated by the British American Oil Co. as thereinafter provided. The Retail Dealer Sales Agreement made on the same date obligated the lessee to sell only the products of the British American Oil Co. on the terms and conditions therein set forth, and also contained a list of the equipment furnished by the company to the tenants on loan upon the terms and conditions fully set forth in that contract.

The problem in this appeal is to decide what, upon the facts, is the true legal relationship between the parties. The County Court Judge thought that it was that of licensor and licensee and accordingly held that the summary procedure for which provision was made in Part III of the Landlord and Tenant Act could not be invoked by the appellant.

Counsel for the tenants submitted to this Court that the true legal relationship was that of licensor and licensee. He contended that on a proper construction of the formal documents and on an accurate appraisal of the proper inferences to be drawn from the surrounding circumstances and the conduct of the parties, the respondents should be held to have

consideration of the tenant's covenant to pay rent and do those things required of him, the landlord demised the premises to the tenant surely except in unusual circumstances only an express restriction as to possession and control should be regarded and restrictions should not be read into the document because of positive covenants on the part of the landlord as are found in cl. 6.

This "Lease Agreement" provided for the demise of the premises and for carrying on of a business there. In such circumstances I should think that it was really unnecessary to include covenants to provide for the tenant's occupancy of the premises or the installation of the machinery and equipment needed for the business contemplated by the parties and the access to the premises of those persons to be served. I should think that the right of the tenant appellant to enter and reach the demised premises in a multiple occupancy building should be implied with the demise and in circumstances such as these it was really unnecessary to require a covenant to permit the installation, maintenance, replacement and removal of the automatic machines. Further, perhaps because the appellant was a limited company and carried on business by its employees and agents, it considered it better to obtain the covenant cl. 6(b) and it was no doubt prudent to obtain the covenant cl. 6 (a) when at the same time obtaining from the landlord its covenant with respect to competition. As to cl. 6(c) the tenants of the building were to be the appellant's customers and if the demised premises were to be kept locked and used only for the purposes as the parties intended at any hour of the night or day, it was also prudent for the appellant to obtain the covenant in cl. 6 (c).

None of these covenants make the appellant's possession any the less exclusive; none of these covenants relinquish any control by the appellant to the landlord; indeed to the contrary, they assure the appellant's exclusive possession and assure its control and occupancy. In the circumstances, I hold that the document was intended to and did in fact confer upon the appellant exclusive possession and exclusive control of the demised premises. Under this agreement the landlord had no right to possession and no right to control of the demised premises. Conversely, the appellant alone had these rights and with them all of the obligations and liabilities of a tenant. The document is a valid lease and the defendant has breached it as alleged....

In the result, then, the appeal is allowed....

NOTES

1) In recent years there has been much litigation in the English courts over the lease/licence test, principally because English statutes protecting tenants' rights apply only when the tenant has a "lease". Landlords sought to evade these statutes by giving tenants what they referred to as "licences". The leading case is Street v. Mountford [1985] A.C. 809 (H.L.). Mr. Street rented a room to Mrs. Mountford pursuant to an agreement which gave her the right to exclusive possession. Throughout this agreement the word "licence" was used to refer to it: for example one clause stated that "an initial deposit equivalent to 2 weeks licence fee will be refunded on termination of the licence...." Street argued, in the words of Lord Templeman, for the following proposition of law: "an occupier granted exclusive possession for a term at a rent may nevertheless be a licensee if ... there is manifested the clear intentions of both parties that the rights granted are to be merely those of a personal right of occupation and not those of a tenant". The House of Lords rejected this argument, and largely ended a long-running controversy in English law in this area, by holding that exclusive possession for a term at a rent creates a tenancy in the absence of special circumstances. Such special circumstances would include, for example,

accommodation that went with a job, such as caretaker's premises, but they could not include statements of apparent intention by the parties that their agreement be a licence: "the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent". In a now famous metaphor Lord Templeman stated: "The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade".

2) Two recent Canadian cases reveal some inconsistency. In Read Marketing Inc. v. Minister of Transportation and Highways (1995), 56 L.C.R. 55 (B.C. Expropriation Compensation Board) the plaintiff operated a gas station and convenience store under an agency agreement with an oil company, which itself leased the premises from the owner. The ministry acquired the land from the owners, and made an agreement with the oil company. The plaintiff argued that it was entitled to compensation. Whether it did so depended on whether it was an "owner" of land according to the definition in the Highway Act, which in turn depended on whether it was "a person having an estate, interest, right or title in or to the land". If the agreement to occupy was a lease, it would do so. If it was a licence, it had no such estate or interest. After reviewing the terms of the agreement the Board concluded that its "dominant objective" was to enable gas to be sold. It then noted that "nowhere is the agency agreement described as a lease". In fact it was referred to as conferring "an entitlement to occupy", and as discussing "occupancy costs" and "licence fees", not rent. The oil company also reserved the right to change the licence fee at any time, merely by notifying the plaintiff. Indeed, the agreement gave the oil company a "pervasive" right to control the premises. It specified hours of operation, what kind of advertising was to be used, how sales displays should be mounted, and that the company could enter at any reasonable time and inspect. Finally, the Board noted that the agreement to occupy was stated to be personal and non-assignable. It concluded: "the foregoing provisions are indicia of an agreed arrangement ... in the nature of a licence rather than a lease. They point to a personal contractual relationship through which the claimant can ... exercise a personal privilege to occupy premises." The Board said that

the law was that "the language employed by the parties" was "compelling evidence as to the true nature of the relationship which they seek to form", and therefore this was a licence.

In a recent Ontario case, Neda Rahimi v. Regional Assessment Commissioner Region No. 9, Unreported, General Division, 29 January 1997, the issue was whether someone was liable for property tax, which in turn depended on whether an agreement between an individual and a church was a lease. Lax J. said that Street v. Mountford "establishes the test for a tenancy at common law", which was that "if the agreement confers on the occupier exclusive possession, this is prima facie a grant of an interest in land". That is, Street "stands for the proposition that while the parties may call it otherwise, the grant of exclusive possession is the singular distinguishing feature between a license and a lease".

C) THE INDEPENDENCE OF COVENANTS

One of the incidents of the landlord-tenant relationship being a property relationship is the doctrine known as "the independence of covenants". Covenants are terms in the lease in addition to the grant of the estate itself by which either or (usually) both parties agree to undertake certain duties - the landlord might provide heat, for example, or agree to trim a hedge, while the tenant would agree to pay rent or repair wear and tear. To say that covenants are "independent" at common law means that failure by either party to perform an obligation does not give a right to the other to terminate the lease. That is, performance of an ancillary obligation is independent of the duty to perform corresponding ones and/or the principal one. As McDonald C.J.B.C. put it in Falleson v. Spruce Creek Mining Co, [1942] 4 D.L.R. 708 (B.C.C.A.): "a lessor cannot re-enter for mere breach of covenant".

However, he also noted that if re-entry for that particular breach was made "an express term in the lease", the lessor could do so. That is, if the lease was made conditional on the performance of that particular ancillary obligation then breach of the obligation would enable the landlord to end it. This is not an exception to the independence of covenants, but is an application of the notion, seen already in chapter three, that estates may be conditional.

Laskin, Cases and Notes on Land Law, puts it this way: "Where a bargain is made for the lease of premises ... on terms embodied in a formal document of lease, the lessee (at least on entry) acquires an estate which he holds subject to those terms. The pertinent question is to what extent is the transaction regarded as the transfer of an interest in land (and hence governed by rules and doctrines developed as part of the law of estates) and to what extent is it regarded as a business dealing (and hence governed by rules and doctrines developed later as part of the law of contracts).... Where the relationship was still that of lessor and lessee (before entry into possession) the common law tended to emphasize the contractual aspect of the bargain.... Once, however, tenure was established, whether in pursuance of a formal lease or of an agreement for a lease, property conceptions dominated. This was particularly true in respect of the covenants of the respective parties. Apart from express provision on the matter, the contract rule of dependency of promises was ignored. Thus, the tenant was not entitled to be excused from further performance or to terminate his lease unless there was a breach of condition by the landlord rather than a mere breach of covenant."

In recent years there has been some undermining of this notion, a matter to which we will return at the end of this chapter.

D) FROM PROPERTY TO CONTRACT? THE LAW RELATING TO ABANDONMENT

There are a variety of ways by which a leasehold relationship can be ended, one of which is known as "surrender". Using an old definition, this is "the yielding or delivering up of lands or tenements and the estate a man has therein, unto another that has a higher and greater estate". "Surrender" cannot be unilateral, it is not brought about merely by the tenant quitting the premises, an action we should call "abandonment". If the tenant obtains the landlord's agreement (express or implied) to his or her leaving, such agreement converts mere abandonment into surrender.

What if the tenant wants to surrender half way through a one-year lease and the landlord does not? Putting aside any issues relating to specific performance, apply to this problem what you have learned in contract law. You would tell the tenant that he or she is probably best to just get out and hope that the landlord, who has a duty to mitigate damages, will find somebody else to rent the premises at the same or a reduced rent. Your client would be liable for damages for breach, but they might not be that heavy, being only the difference between what you would have paid and what the landlord can get somebody else to pay. Conversely, you would probably advise the landlord that he or she cannot make the tenant stay, that the best thing to do is to secure the premises and try to find another tenant knowing that you can sue the defaulting tenant for any shortfall.

But, as we have seen, a lease is not a contract, it is an estate. And according to classical principles that means that if it is granted for twelve months it lasts for twelve months, unless surrendered, in which case it is absolutely at an end with no future obligations on either side. So, according to this classical property law analysis of the problem, as laid out in Goldhar below, you would have to tell the tenant something different. You would have to say that whether or not he or she physically abandons the premises the lease subsists for 12 months and he or she is liable for the whole term. The landlord has no duty to mitigate damages. But hopefully the landlord will do something foolish like re-enter and change the locks, in which case he or she will be considered to have accepted that a surrender has taken place and your client will have no liability left at all. So it's all or nothing for the tenant. Conversely, if advising the other side, you would caution the landlord that finding another tenant would be interpreted as a surrender and no rent could be got from the defaulting tenant. If the landlord wanted to get such rent, he or she would have to leave the premises unoccupied. Moreover, the landlord cannot sue for the whole of the term's rent when the tenant decamps after 6 months but must wait until it becomes due and is not paid (assume it's due monthly).

All of this is explained in Goldhar. Both that case and Highway Properties, which follows it, also show that there are some wrinkles in the traditional position and that factual considerations relating to such matters as whether, and if so when, the landlord accepted the abandonment and therefore brought about a surrender can be very important.

As you read Goldhar, think about why the traditional position reinforces the principal lesson of this chapter - that the lease is a property relationship.

You will also see that Highway Properties alters the traditional law: given the result in that case, how would you answer the question contained in the first clause of the heading to this section?

GOLDHAR v. UNIVERSAL SECTIONS AND MOULDINGS LTD. (1962), 36 D.L.R. (2d) 450 (Ont. C.A.)

The judgment of the Court was delivered by McGILLIVRAY, J.A.: This is an appeal by the defendant Universal Sections and Mouldings Limited from the judgment of Gale, J., pronounced on February 26, 1962 ... whereby judgment was awarded to the plaintiff against the defendant in the amount of $14,132.10 and costs as damages for breach of contract in a lease.

The plaintiff Goldhar was the lessee of industrial premises in the City of Toronto known as 452 Birchmount Rd. By a sublease dated February 9, 1956 the plaintiff demised to the defendant part of these premises at a rental of $833 per month for a term expiring on October 14, 1962, that is for a period of 8 years and 6 months. On December 12, 1958 the defendant listed its space for subletting at an asking rental at $1,000 per month apparently because it had at that time entered upon the construction of a new building for its enterprise which building it subsequently occupied. No sublease was secured by the defendant though the rent asked was reduced as time went on and on March 11, 1959 a letter was sent to the plaintiff setting out a number of alleged breaches of covenant by the plaintiff and concluding with the paragraph: "Universal Sections and Mouldings Limited therefore give you notice that you have broken the lease through the above actions and that they therefore consider the lease null and void and will vacate the premises on the 14th day of May, 1959."

To this, solicitors for the plaintiff replied by letter of March 11, 1959 denying breach of covenant or interference with possession. The letter continued as follows: "Should your client see fit to obtain a sub-tenant of these premises, we are sure that our client will give every consideration to a request for approval of such sub-letting, it being apparent that your client, perhaps for some other reasons not disclosed in your letter, no longer desires to occupy the demised premises. Our client considers the lease to be in full force and effect and any attempt on the part of your client to abandon the lease will be considered as a breach of covenant thereunder."

This was followed by a letter from the plaintiff's solicitor on April 28, 1959 demanding payment of rental due on April 15, 1959 to which the following reply was received on May 4, 1959: "Universal Sections and Mouldings Limited is still taking the position that the lease was broken by Cecile Goldhar and was then terminated by notice. The April 15th rent had been paid in advance when possession was taken."

By letter dated May 14, 1959 but found by the trial Judge to have been mailed on May 23rd and received by the plaintiff on May 24, 1959, the defendant returned the keys of the premises to the plaintiff. The defendant vacated the premises on May 24, 1959. On June 9, 1969 the plaintiff listed the premises with a rental agent. From the middle of July, 1959 to November 17, 1959 the plaintiff permitted her husband to utilize the premises for the purposes of Maple Leaf Plastics Limited, and during that period 25% to 50% of the space was actually used by that company. As efforts throughout this time to rerent the premises had been unsuccessful the plaintiff on November 17, 1959 entered into a lease with Maple Leaf Plastics Ltd running to the end of the defendant's term at a rental of $500 per month.

CHAPTER ELEVEN

LANDLORD AND TENANT OBLIGATIONS AND REMEDIES

A) INTRODUCTION

The rights and obligations of landlords and tenants are of three types: those implied by the common law, those that can be negotiated between the parties, and those imposed by statute. This chapter deals variously, although incompletely, with all three categories.

Sections (b), (c), and, to a much lesser extent (d), below, deal with the first category - obligations imposed by the common law. Most of this material concerns obligations on landlords. These "implied obligations" arise from the fact of the relationship itself, not from any agreement between the parties. They are invariably expressly included in leases anyway, either through an agreement to adopt the "usual clauses" of the jurisdiction or through express inclusion of, for example, a covenant for quiet enjoyment. Implied terms will yield to express ones covering the same subject matter.

There are two principal implied terms which put obligations on the landlord - the covenant for quiet enjoyment and the covenant for non-derogation from grant. These are dealt with in parts (b) and (c) of this chapter.

Part (d) considers the circumstances in which there is also an implied covenant that the demised premises be fit for use.

Parts (e), (f), and (g) examine various issues related to the principal obligation on the tenant - to pay rent.

B) THE LANDLORD'S COVENANT FOR QUIET ENJOYMENT

The covenant for quiet enjoyment supports the tenant's right to possess the whole of the land granted without an interference, traditionally only a physical interference, by the lessor or persons claiming under the lessor. For example, if the lessor reserves the right to work minerals under the land and then causes a subsidence by doing so, the covenant for quiet enjoyment will be breached. Like all covenants, the covenant for quiet enjoyment is independent, and a breach of it gives rise to an action for damages.

For further elucidation of the nature of the covenant, see the following cases and notes.

OWEN v. GADD, [1956] 2 W.L.R. 945 (C.A.)

LORD EVERSHED M.R. This was an action for damages for breach of a covenant for quiet enjoyment. By a lease dated October 13, 1955, the lessors demised to the lessee the ground floor lock-up shop, situate at and known as No. 16 Eden Street Kingston-upon-Thames, for a term of ten years at a rent of L700 per annum. The lessee entered into numerous covenants of the kind that one would expect in a lease of this character. The covenants included the following "and also will use and occupy the said shop for the retailing of baby carriages radio sets and radio accessories and toys and for no other purpose except with the consent in writing of the lessors." Among the lessors' covenants was a covenant for quiet enjoyment in ... very usual form: "And ... the lessee .... may peaceably and quietly hold and enjoy the said premises hereby demised during the term hereby granted without any lawful interruption or disturbance from or by the lessors or any person or persons claiming under them or either of them."

Three days after the grant of this lease the lessors, through certain contractors employed for the purpose, erected, immediately in front of the shop window and door, scaffold poles to carry out repairs which were undoubtedly needed, and indeed urgently needed, on the upper part of the same premises in Eden Street. These upper premises belonged to the lessors and were in the occupation of the lessors. Most unfortunately, the lessors omitted to warn the lessee of this impending operation or to inform him about it; and the dismay of the lessee in finding scaffold poles in front of his shop window was natural enough. What, unfortunately, aggravated the dismay of the lessee was that the week next following happened to be a week in which a very much more active retail trade was likely in the class of articles which the lessee was selling and had, indeed, covenanted to sell. In fairness to the lessors, however, it must be said that, when the view of the lessee was brought to their minds, they took all proper steps as good landlords to minimize the disarrangement (I am deliberately using a neutral word) of the lessee's affairs by arranging that the scaffold poles should be placed as conveniently as possible from the lessee's point of view and also by arranging that the work should be done at once and with great expedition. It was in fact completed in eleven days instead of taking, as had originally been expected, six weeks. The lessee nevertheless claimed that he had suffered through this vital week a serious and a substantial loss of his business as a shopkeeper, and that the presence of these scaffold poles, and perhaps the men working on the planks immediately above them, seriously interfered with the ordinary access of the public to the shop and to the shop window. It need not be emphasized that a lock-up shop, according to the ordinary significance of that term, means a place which will have a shop window and in that shop window the goods to be sold will be exhibited so as to attract custom.

In the circumstances the judge came to the conclusion that the erection of these scaffold poles in close proximity to the shop window constituted a breach of the covenant for quiet enjoyment, not being of so trifling or purely transitory a character as to disentitle the lessee from making any claim; but, though the judge heard evidence of lost trade, he was not satisfied that the lessee had proved in fact specific losses, and he therefore ended his judgment with these

privacy, or otherwise is not enough." If that passage be taken, as I am content to assume that it is, as correct, then it certainly does not, as I think, disable in any sense the basis upon which the judge in the present case decided in the plaintiff's favour.

It was said by Mr. Chapman that ... there could be no breach of the covenant for quiet enjoyment unless there was what he called an actual physical irruption into or upon the premises demised on the part of the landlords or some persons authorized by them by their actually entering upon or invading the premises or say by the irruption thereon of water emitted from the landlords' premises elsewhere. In my judgment, that submission is not justified by the authorities.... Concluding, therefore, as I do, that in this case the judge was entitled to find as a fact that the interference was substantial and that there was no principle of law which disqualified him from concluding as he did, I think that this appeal must fail and should be dismissed.

ROMER L.J. I also agree, and have very little to add. I think it has become quite well established by the authorities that no act of a lessor will constitute an actionable breach of a covenant for quiet enjoyment unless it involves some physical or direct interference with the enjoyment of demised premises. In regard to that, I think that Mr. Dewhurst was right when he said that, in considering whether the enjoyment of premises has been disturbed, one looks to see what the purposes were for which the premises were granted. In a case such as the present, where the premises were demised for the use of a retail shop, the question is as to whether there has been an interruption or disturbance by the lessor of the enjoyment of the premises in relation to that purpose.

The question whether or not there has been such a physical or direct interference with the enjoyment of the premises has been decided here by the judge on the facts in favour of the plaintiff. I am bound to say that I entirely agree with him. One has a very good picture of what is being done from the photographs, which show the scaffolding which was put up and which show that there was an interference with the access to the shop premises by anybody who desired to enter them.

NOTES

1) A landlord is not responsible under this covenant for the actions of another tenant. See on this point Malzy v. Eichholz, [1916] 2 K.B. 308 (C.A.). The plaintiff leased a restaurant which was part of a block of shops and offices owned by the defendant. An adjoining part of the block was let to a third party who created a nuisance for the restauranteur. The landlord was not liable so long as he did not participate in the action creating the nuisance.

2) Owen v. Gadd represents the traditional position that the interference by the landlord need be direct and physical, and that disruption of comfort through noise, threats by the landlord, etc invasion were not covered by the covenant for quiet enjoyment. A Canadian application of this position is Franco v. Lechman (1962), 36 D.L.R. (2d) 357 (Alta. C.A.). Premises were leased for use as a coffee, tobacco and candy shop. The building was sold before the lease expired, and the new landlord embarked on a course of action presumably intended to drive the tenant out. He refused the rent cheques, issued a notice to vacate based on non-payment of rent, created scenes

in front of customers, and tried to prejudice the tenant's Italian customers against him. The tenant won at trial on a claim of breach of the covenant for quiet enjoyment, and the landlord appealed. Kane J.A. said at pp. 360-361:

"Where the ordinary and lawful enjoyment of demised premises is substantially interfered with by acts of the lessor, the covenant is broken although neither title to nor possession of the premises may be otherwise affected....The interference must be some physical interference with the enjoyment of the demised premises and a "mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough". In my opinion, there was a physical and substantial interference by the appellant with the enjoyment by the respondent of the demised premises for the purposes for which they were demised, that is operating a coffee counter and sale of confections and tobacco. In arriving at this conclusion I do not consider that the giving of a notice to vacate in itself constituted a breach of the covenant. It is clear from the evidence of the respondent that he did not treat it as a valid notice and because of it vacate the premises. But the fact that the notice was given is evidence of the determination to endeavour to force the respondent to vacate and this, together with the other evidence accepted by the trial Judge, makes it plain that the appellant by his actions breached the covenant."

However, in recent years the scope of the covenant has been expanded. Often-cited as the beginning of this trend is Kenny v. Preen, reproduced immediately below. The notes following it discuss other recent cases.

NOTES

1) Lord Denning referred to Kenny v. Preen in McCall v. Abelesz, [1976] 1 All E.R. 727 (C.A.). The landlord refused to pay utility bills, and as a result the gas, water and electricity were cut off. Denning L.J. stated that the covenant for quiet enjoyment "is not confined to direct physical interference from the landlord", and that "it extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant". Authority for this was given as Kenny v. Preen. More recently, the English Court of Appeal has held that a great deal of continuous noise, in and of itself, constitutes a breach of the covenant: Southwark London Borough Council v. Mills, [1999] 2 W.L.R. 409 (C.A).

2) A series of recent Ontario cases have also consideraby widened the scope of this covenant. A substantial "invasion" of dust and dirt caused by the landlords' renovations to neighbouring premises was held to constitute a breach of the covenant for quiet enjoyment in Amadon Properties Ltd v. Pacific Apparel Inc (1990), 13 R.P.R. (2d) 186 (B.C.S.C.). A "retrofit" of the entire building by the landlords, which meant that everything was torn out and altered, represented a breach of the covenant for quiet enjoyment: 116531 Canada Inc. v. 569562 Ontario Inc. (1995), 47 R.P.R. (2d) 81 (Ont. G.D.). In Cunningham v. Whitby Christian Non-Profit Housing Corp (1997), 9 R.P.R. (3d) 210 (Ont. G.D.) the tenant occupied assisted housing. She dated another tenant, who was a "problem" tenant and who eventually moved out. But he still saw her, and on occasion stayed overnight. The tenant's lease contained a clause restricting occupancy of her apartment to her and her young son. The landlord wrote to her to say that while she could have an occasional overnight guest, they were concerned that the boyfriend was more than that. Later it sent the boyfriend a notice prohibiting him entry to the complex and threatened him with trespass proceedings if he did so. The court found that the letters warning about occupancy were not a breach of the covenant, but an attempt to prevent a tenant inviting a particular person to her apartment was a breach. The landlord could bar a person who was not a tenant, but could not do so if that person was an invitee of a tenant.

In Mayfair Tennis Courts Ltd. v. Nautilus Fitness & Racquet Centre Inc. (1999), 23 R.P.R. (3d) 271 (Ont. G.D.) The landlord, which wanted to move into the same business as the tenant, solicited the tenant's members to join its fitness club. Juriansz J. cited Watchcraft Shop Ltd. v. L & A Development (Canada) Ltd. (196), 49 C.P.C. (3d) 17 (Ont. G.D.) for the following proposition: "the requirement that the interference be direct and physical continued until fairly modern times.... However, the more current view, and one with which I am in agreement, is that any act by a landlord which is an interference with the tenant's ability to use the premises for the intended purposes, may constitute a breach of the right to quiet enjoyment". He then held that interference with membership was an interference with the business, and that the landlord had thereby breached the covenant for quiet enjoyment.

This seems a very substantial amendment to the common law, especially given what is said below about the scope of the covenant for non-derogation from grant.

would include the carrying on of a rival business, and would compel them to insert a covenant restraining the carrying on of any business similar to the plaintiff's business in any subsequent lease of any of the property retained by them, for it would seem to me to be difficult to confine the case to those shops which are actually adjoining, or to draw a line defining which of the premises were to be subjected to such a restriction.

[Luxmoore J. then discussed the O'Cedar case, citing these passages from it.]

"In the case before me ... the purpose for which the premises were demised to the plaintiffs has not been frustrated by what has been done by the defendants. The plaintiffs can still conduct their business as they were able to before the surrendered premises were let to Davies.... [The question is] whether the principle that a lessor may not derogate from his grant extends beyond cases in which the purpose of the grant is frustrated to cases in which that purpose can still be achieved albeit at a greater expense or with less convenience.... The contention that the defendants, by doing something on the adjoining land which is not in itself unreasonable or unbusinesslike, which has not affected the demised premises physically in any way, which has not rendered it less easy or less legal to carry on upon them the business for which they were demised, but which has had the effect of adding substantially to the expense of carrying on that business there, have derogated from their grant. I should be extending the application of the principle into a region quite different from that in which it has hitherto been applied if I were to hold that it applied to anything done by a lessor upon adjoining land which, while not otherwise affecting the demised premises or their user in any way, merely made it more expensive than it was before for the lessee to carry on his business on the demised premises. I do not think such a case comes within that principle at all."

In my judgment, the decision [in O'Cedar] ... applies, and governs the present case. I am unable to hold that it was within the reasonable contemplation of the plaintiff and defendants that the defendants were putting themselves and their remaining property under such an obligation to the plaintiff as that contended for by her. For these reasons, I think that the action fails, and must be dismissed with costs.

NOTES

1) In Caplan et al v. Acadian Machinery Ltd. (1976), 70 D.L.R. (3d) 383 (Ont. Div. Ct.) Caplan leased premises to Acadian in 1972, the lease providing that the tenant would pay for maintenance of the heating equipment and for insurance. Caplan then leased the adjoining premises to another tenant, whose business was of a nature that caused the insurance premiums on Acadian's property to rise. Acadian refused to pay the insurance, arguing that Caplan had derogated from its grant. Caplan won at trial. The Divisional Court judgment on appeal is a short oral one, Holland J. stating that: "We are all of the view that the action of the landlord in the circumstances set out above ... was not a derogation from its grant". What distinguishes Caplan from Harmer?

2) In Langley's Ltd. v. Lawrence Manor Investment Ltd., [1960] O.W.N. 436 (H.C.) a plan attached to the lease by the landlord showed a parking area attached to the shopping centre in which the tenant rented premises. The landlord later constructed a new building in the parking area, and this detrimentally affected the tenant's business. King J. held that the attachment of a plan to the lease was intended to confirm that this area would be available for parking. Hence the new construction did constitute a derogation from the property granted in the lease, and the plaintiff was entitled to damages.

3) The rule that it is not a derogation from grant for a landlord to permit competitive enterprises in neighbouring premises was confirmed in Clark's Gamble of Canada Ltd. v. Grant Park Plaza Ltd. (1967), 64 D.L.R. (2d) 570 (S.C.C.). Spence J. said at pp. 579-580:

"In the present case, the landlord, whether it be considered to be Grant Park Plaza Ltd. or either of its subsidiary companies, does not propose to utilize any part of the balance of its land in a fashion which would result in any part of the lands leased to the appellant being rendered unfit for doing business. It proposes to erect a building more than twice the size of that leased to the appellant and lease the said building to the F.W. Woolworth Company for the carrying on of a Woolco store. It is true that one could only expect the operation of the Woolco Store to be stern competition for the appellant. But this is far from conduct which would render the premises leased to the appellant unfit for it to carry on its business. To adopt the words from Browne v. Flower, "After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort". Certainly the responsible officers of the appellant were well aware of the rights and interests of their employer. They had had long experience in both merchandising and leasing and would have found it a matter of no particular complication whatsoever to have drafted and insisted on a clear and exact covenant against leasing to a competing enterprise."

E) THE TENANT'S OBLIGATION TO PAY RENT AND LANDLORD REMEDIES

Rent is not a requirement of the leasehold relationship, and therefore there is no implied obligation to pay it at common law. But if it is included in the lease, and of course that is invariably the case, then the common law imposed an obligation to pay. If rent is included in a lease the obligation to pay it is now a statutory condition: see Ontario's Landlord and Tenant Act, s. 18 (1) (below).[1]

If the tenant fails to pay rent within the 15 days mandated by s. 18 (1), the landlord has a number of options. He or she can choose to end the lease - called a forfeit of the lease. This may be done either by a physical re-entry by the landlord, or through an action for possession. In either case the landlord may also, and obviously usually would, sue for rent due. A landlord has another remedy to use for unpaid rent, one unique to it among all "creditors". The landlord may levy distress on the tenant - seize the tenant's goods which are on the demised premises and sell them to meet the rent due. However, distress is a remedy which flows only from the existence of the landlord-tenant relationship, and therefore it requires that relationship to continue. That is, the landlord cannot both forfeit the lease and take distress.

FORFEITURE: STATUTORY PROVISIONS

At common law the right to forfeit could be exercised as soon as the tenant failed to pay rent. Sections 18 (1) and 20 (4) of Ontario's Landlord and Tenant Act, R.S.O. 1990, c. L-7 change the common law position to some degree:

18 (1) Every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, shall be deemed to include an agreement that if the rent reserved, or any part thereof, remains unpaid for fifteen days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it is lawful for the landlord at any time thereafter to reenter into and upon the demised premises or any part thereof in the name of the whole and to have again, repossess and enjoy the same as of the landlord's former estate.

20 (4) Where the proceeding is brought to enforce a right of re-entry or forfeiture for non-payment of rent and the lessee, at any time before judgment, pays into court all the rent in arrear and the costs of the proceeding, the proceeding is forever stayed.

While the landlord may exercise the right of forfeiture either by court action or by physical entry, the Criminal Code, s. 72, limits the landlord's freedom of action in the latter case:

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[1] Note that the Landlord and Tenant Act is now properly called the Commercial Tenancies Act. This change was made by the Tenant Protection Act, S.O. 1997, c. 24, s. 213 (5) (in force as of June 1998). Its provisions remain the same, and this casebook continues to use the old name, because that name is used in the cases.

72 (1) A person commits forcible entry when that person enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.

(1.1) For the purposes of subsection (1), it is immaterial whether or not a person is entitled to enter the real property or whether or not that person has any intention of taking possession of the real property.

(2) A person commits forcible detainer when, being in actual possession of real property without colour of right, he detains it in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person who is entitled by law to possession of it.

(3) The questions whether a person is in actual and peaceable possession or is in actual possession without colour of right are questions of law.

DISTRESS GENERALLY

Distress is an ancient remedy, and an unusual one. Ziff calls it a "powerful remedy" and a "relic of feudalism": Principles of Property Law, p. 226. It allows the landlord to summarily take the tenant's goods that are found on the demised premises and sell them to meet the rent arrears. Creditors generally must use the courts to enforce debts. There are limits on the kinds of property that can be taken, limits defined both by the common law and by statute. The Landlord and Tenant Act also contains a variety of other provisions regulating distress, some of which are reproduced here:

30 (2) A landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction does not apply in favour of a person claiming title under an execution against the tenant, or in favour of a person whose title is derived by purchase, gift, transfer, or assignment from the tenant whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods or chattels on the premises in the possession of the tenant under a contract for purchase, or by which the tenant may or is to become the owner thereof upon performance of any condition, nor where goods or chattels have been exchanged between tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor does the restriction apply where the property is claimed by the spouse, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of the tenant's, if such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase gift, transfer or assignment from any relative to whom the restriction does not apply.

43. Distress shall be reasonable.

47. Save as herein otherwise provided, goods or chattels that are not at the time of the distress upon the premises in respect of which the rent distrained for is due shall not be distrained for rent.

48 (1) Where any tenant ... fraudulently or clandestinely conveys away, or carries off or from the premises the tenant's goods or chattels to prevent the landlord from distraining them for arrears of rent so reserved, due, or made payable, the landlord or any person lawfully empowered for that purpose by the landlord, may, within thirty days next ensuing such conveying away or carrying off, take and seize such goods and chattels wherever they are found, as a

distress for such arrears of rent, and sell or otherwise dispose of them in such manner as if they had actually been distrained by the landlord upon such premises for such arrears of rent.

(2) No landlord or other person entitled to such arrears of rent shall take or seize, as a distress for the same, any such goods or chattels that have been sold in good faith and for a valuable consideration, before such seizure made, to any person not privy to such fraud.

49. Where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, the tenant's servant, or agent, or other person aiding or assisting therein, are or are believed to be in any house, barn, stable, outhouse, yard, close or place, locked up, fastened or otherwise secured so as to prevent them from being taken and seized as a distress for arrears of rent, the landlord or the landlord's agent may take and seize, as a distress for rent, such goods and chattels, first calling to the landlord's assistance a peace officer who is hereby required to aid and assist therein, and, in case of a dwelling house, oath being also first made of a reasonable ground to believe that such goods or chattels are therein, and, in the daytime, break open and enter into such house, barn, stable, outhouse, yard, close or place and take and seize such goods and chattels for the arrears of rent as the landlord might have done if they were in an open field or place upon the premises from which they were so conveyed or carried away.

50. If a tenant so fraudulently removes, conveys away or carries off the tenant's goods or chattels, or if any person wilfully and knowingly aids or assists the tenant in so doing, or in concealing them, every person so offending shall forfeit and pay to the landlord double the value of such goods or chattels, to be recovered by action in any court of competent jurisdiction.

[The fraudulent removal provisions were applied in Park Street Plaza Limited v. Surinder Bhamber (1992), 23 R. P R. (2d) 288 (Ont G.D). The court found that the tenant had indeed removed goods from the premises for the purpose of preventing the landlord from taking distress. The rent owed was a little less than $10,000, the value of the goods removed $25,000. The court then held that s. 50 gives no discretion: "it is a mandatory provision that the amount of the penalty shall be double the value of the goods or chattels, and I accordingly fix that particular penalty at the amount of $50,000."]

53. Where any goods or chattels are distrained for any rent reserved and due upon any demise, lease or contract, and the tenant or owner of them does not, within five days next after such distress taken and notice thereof, with the cause of such taking, left at the dwelling house or other most conspicuous place on the premises charged with the rent distrained for, replevy the same, then, after the distress and notice and the expiration of such five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn to appraise them truly, according to the best of their understandings, a memorandum of which oath is to be endorsed on the inventory, and after such appraisement the person so distraining may lawfully sell the goods and chattels so distrained for the best price that can be got for them towards satisfaction of the rent for which they were distrained and of the charges of the distress, appraisement and sale, and shall hold the overplus, if any, for the owner's use and pay it over to the owner on demand.

54. Where a distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the person distraining, or by that person's agent, or if there has been an omission to make the appraisement under oath, the distress itself shall not be therefore deemed to be unlawful, nor the person making it be deemed a trespasser from the beginning, but the person aggrieved by the unlawful act or irregularity may recover by action full satisfaction for the special damage sustained thereby.

55 (1) A distrainer who takes an excessive distress, or takes a distress wrongfully, is liable in damages to the owner of the goods or chattels distrained.

F) FORFEITURE AND RELIEF AGAINST FORFEITURE FOR TENANTS

Ontario's Landlord and Tenant Act provides some protection for tenants from forfeiture as a consequence of breach of condition. Section 19 (2) is a notice requirement, which the courts have interpreted strictly:

19 (2) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, other than a proviso in respect of the payment of rent, is not enforceable by action, entry, or otherwise, unless the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

Note also that the courts are strict in requiring landlords to conform to any particular termination procedures in the lease itself. The rationales for close adherence to notice and other procedures in termination are much the same as for granting relief against forfeiture, discussed below.

More substantial protections are provided by the "relief against forfeiture" provisions contained in section 20:

20 (1) Where a lessor is proceeding by action or otherwise to enforce a right of reentry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or application in the Ontario Court (General Division) brought by the lessee, apply to the court for relief, and the court may grant such relief as, having regard to the proceeding and conduct of the parties under section 19 and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs. expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just.

(2) This section and section 19 apply, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of a statute....

(6) This section applies to leases made either before or after the commencement of this Act and applies despite any stipulation to the contrary.

(7) This section does not extend,

(a) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the lessee making an assignment for the benefit of creditors under the Assignments and Preferences Act, or on the taking in execution of the lessee's interest....

The reference in s. 20 (2) above to a "right of re-entry ... in pursuance of the directions of a statute" is to s. 18 (2) of the Act:

18 (2) Every such demise shall be deemed to include an agreement that if the tenant or any other person is convicted of keeping a disorderly house within the meaning of the Criminal Code (Canada) on the demised premises or any part thereof, or carries on or engages in, on the demised premises or any part thereof, any trade, calling, business or

occupation for which a licence is required under a by-law passed under sections 224 or 225 of the Municipal Act without that licence, it is lawful for the landlord at any time thereafter to re-enter into the demised premises or any part thereof and to have again, repossess and enjoy the same as of the landlord's former estate.

The origins of the statutory provisions providing for relief against forfeiture are in equity, and the rationale of both equitable relief and the statute is that "the right of entry by the landlord is typically meant to provide only security for the performance of the obligations of the lease, a security that is unnecessary once the tenant has made good on the default": Ziff, Principles of Property Law, p. 227.

There are a good many cases on the criteria for granting relief against forfeiture. In "Remedies for Breaches of Commercial Leases", Law Society of Upper Canada Bar Admission Materials 1986-1987: Real Estate and Landlord and Tenant, Barry Bernstein summarises some of the principal criteria (pp. 729-730):

1) whether the landlord can be adequately compensated by money or by the imposition of terms;

2) the prejudice to the landlord if relief is granted as compared to the prejudice to the tenant if relief is not granted;

3) the hardship that would be imposed on the tenant if relief is not granted, in view of the extent of the tenant's investment in the premises;

4) the nature of the breach, and, in particular, whether it occurred through a mistake on the tenant's part without any conscious intent to breach the conditions or covenants contained in the lease;

5) whether the tenant has attempted to remedy the breach once it had been drawn to his attention by the landlord, if the breach can be remedied;

6) all relevant circumstances surrounding the landlord-tenant relationship, including breaches of covenants other than the one of which the landlord has complained, and, in particular, whether there has been a strict or fairly casual observance of the lease provisions on the part of both landlord and tenant over the term of the lease;

7) the landlord's real motives in attempting to exercise its right of re-entry and, in particular, whether it appears that the landlord is simply trying to take advantage of the tenant's breach as an opportunity to avoid its long-term bargain.

(1920), 19 O.W.N. 381.

In the present case, I find that the tenant has been, and still is, in breach of the covenants relating to repairs and alterations, the covenant not to assign or sublet without leave, and the covenant not to remove goods from the demised premises. In addition thereto the tenant was, at the date of re-entry by the landlords, in breach of the covenant to pay rent and to pay taxes. With respect to the payment of rent, he has persisted in late payment of same as referred to earlier, notwithstanding repeated requests for prompt payment. The matter of default in payment of taxes was brought to the tenant's attention long before the re-entry. The tenant chose to ignore the landlords' warning in that regard. In addition to all of the aforesaid matters, the tenant has moved his business from the demised premises to a new place of business on the same street. This is not a case of hardship where a tenant is, as a result of a careless oversight or other reason, being forced out of the business for which he rented the premises.

[The landlord's application was allowed.]

NOTES

1) Relief was refused in 931576 Ontario Inc. v. Bramalea Properties (1992), 24 R.P.R. (2d) 1 (Ont. G.D.). The tenant operated a restaurant and bar in the lobby of an office building. It started to provide live music, and this resulted in many complaints from other tenants. The landlord terminated pursuant to a clause in the lease which permitted termination if the quiet enjoyment of other tenants was affected. The tenant applied for but was denied relief. Montgomery J. noted that the tenant was given the opportunity to redress the problem but ignored complaints. Its "attitude" was "inappropriate", and its behaviour "reprehensible", while the breaches complained of were "persistent" and "substantial".

2) The equitable maxim that an applicant must come to the court with "clean hands" was applied in Kochhar v. Ruffage Food Corp. (1992), 23 R.P.R. (2d) 200 (Ont. G.D.). A sub-tenant in a franchise agreement was supposed to pay 7% of revenues to the principal tenant, its "landlord". The tenant believed, with some justification, that the sub-tenant was not reporting all revenues, and terminated as a result. The court denied relief because, as an equitable remedy, relief against forfeiture required the sub-tenant to have "clean hands".

G) LANDLORDS' REMEDIES AND DUTIES FOLLOWING ABANDONMENT: DEVELOPMENTS FROM HIGHWAY PROPERTIES

This section deals further with the issue of abandonment by the tenant, discussed in the previous chapter. Highway Properties left unclear a couple of important issues. One of those was whether a duty to mitigate should be imposed on the landlord; mitigation is discussed below, in the Postal Promotions and Windmill Place cases.

The other issue is "notice". In Highway Properties Laskin J. re-stated the argument presented by counsel for Highway Properties as being that a "fourth option" for the landlord should be added, that the landlord "might elect to terminate the lease but with notice to the defaulting tenant that damages would be claimed on a footing of present recovery of damages for losing the benefit of the lease over its unexpired term". Yet in his conclusion to the judgment there is no mention of "notice". He simply stated: "repudiation by the tenant gives the landlord at that time a choice between holding the tenant to the lease or terminating it, yet at the same time a right of action for damages then arises; and the election to insist on the lease or refuse further performance ... goes simply to the measure and range of damages". The latter passage, and particularly the use of the word "election", suggests that the court was concerned to ensure that the landlord inform the tenant of whether it was electing to keep the lease alive, which is generally necessary in contract law where a repudiation occurs. But beyond that one could say that Laskin J. was imposing no particular "notice". And one also might say that a contractual approach mandates election, but no special notice.

However, many decisions since Highway Properties have required specific notice of an intention to claim prospective damages. A line of cases in the 1970s and early 1980s established not only that there must be notice, but also that the notice had to be more or less contemporaneous with the notice that terminated the lease and brought about a surrender: see, inter alia, Fuda v. D'Angelo (1974), 2 O.R. (2d) 605 (H.C.); Gander Shopping Centre Ltd. v. Powell (1982), 39 Nfld. and P.E.I.R. 313 (Nfld. D.C.). The practising bar refers to this as "a Highway Properties notice".

North Bay is generally considered to be the leading case on this notice.

HIGHWAY PROPERTIES AND MITIGATION

Before Highway Properties the law on mitigation in landlord-tenant relationships was clear; it did not apply, being a principle of contract, not leasehold, law. In Highway Properties Laskin J. made only one mention of mitigation. Following his discussion of the landlord's option to keep the lease alive and re-let the premises on the tenant's account, he stated shortly: "I know that under the present case law the landlord is not under a duty of mitigation, but mitigation is in fact involved where there is a re-letting on the tenant's account". This seems to suggest that he was not imposing a duty to mitigate, and this impression is reinforced when one remembers that the old first option - keeping the lease alive - was left available to the landlord. That is, in the face of a clear repudiation of the lease the innocent party may choose to do nothing but keep the lease alive and "run up" the damages. This was done, for example, in Commercial Credit Corp. v. Harry D. Shields Ltd. (1980), 112 D.L.R. (3d) 153 (Ont. H.C.). A commercial tenant in arrears went into receivership. The landlord met with the receiver, and the latter handed over a note disclaiming the lease and the keys to the premises. Out of concern for security the landlord kept the keys but continued to assert, orally and in writing, that the lease was in force. The landlord also wrote to the receiver to the effect that it was its intention to re-let on the tenant's behalf and to hold the tenant responsible for all damages. A week later the landlord executed a distress warrant, and then sold the tenant's goods for the arrears. Holland J. held that the landlord had not accepted the surrender of the lease, so that it remained in force, and the landlord therefore had the right to take distress.

The failure to impose a duty to mitigate, to balance the benefits given to a landlord who may now sue for the whole benefit of the lease, is perhaps inconsistent with the general principle of treating the lease as contract not a conveyance, enunciated in Highway Properties. Although the mitigation issue has received a fair amount of judicial attention in the last two decades, the results have been quite inconsistent. Postal Promotions is considered the leading Ontario case.

TORONTO HOUSING CO. LTD ET AL v. POSTAL PROMOTIONS LTD. (1981), 128 D.L.R. (3d) 51 (Ont. H.C.)

MONTGOMERY J.: This claim is by a landlord against a tenant under three covenants in a 1968 commercial 20-year lease. The claims are for (1) payment of rent; (2) additional rent.... The issues to be decided are:

(1) Did the landlord unreasonably withhold consent to assignment of the lease?

(2) Was the fresh lease for the landlord's or the tenant's account?

(3) Should the increased value of a subsequent lease be considered in mitigation of the damages on termination of the original lease?

The tenant's position is that the premises were re-let after termination of the lease on the tenant's behalf. The tenant contends that the new lease was more beneficial to the landlord than the original lease to such an extent that it totally covers any amounts owing up to the date of termination and indeed gives the tenant a substantial surplus for which it asserts a counterclaim. The tenant seeks a broad interpretation by this Court of the principles enunciated in Highway

NOTES

1) What exactly does Postal Promotions decide? Some subsequent cases have stated that it found a duty to mitigate; is that correct?

2) A review of other cases on this issue shows a variety of approaches. Some courts have said there is a duty to mitigate, others that there is not but should be. In Grouse Mechanical Co. v. Griffith et al (1990), 14 R.P.R. (2d) 233 (B.C.S.C.) the tenant abandoned the premises and the landlord re-let, having given the new tenant an inducement of four months rent free. The landlord's damages claim included rent for those four months. Cowan J. stated: "Once the tenant breached his obligations or stated his intention to breach his obligations, the plaintiff had a duty to mitigate his loss". The duty could only be avoided in a situation in which the landlord had "substantial and legitimate interest in actual performance". Cowan J took this latter notion from Asamera Oil Corp Ltd. v. Sea Oil and General Corp. (1978), 89 D.L.R. (3d) 1 (S.C.C.), the most recent word from the Supreme Court about when an innocent party to a contract repudiation may be able to insist on performance rather than accept the repudiation, and there was no discussion in this part of the judgment of any of the leading landlord and tenant cases on the topic.

3) At odds with Grouse Mechanical is Transco Mills Ltd. v. Percan Enterprises Ltd., unreported, [1993] B.C.J. No. 222 (B.C.C.A.). The court held that when a landlord keeps the lease alive "and claims for rent due", there is "no basis on which ... [it] can be required to mitigate its loss". Citing Highway Properties, the court held that the option of simply keeping the lease alive was one that the landlord was still entitled to take. The court was not persuaded that it should follow the advice of the province's Law Reform Commission, which had proposed a duty to mitigate in commercial tenancies (Law Reform Commission, British Columbia, Report on the Commercial Tenancy Act (1989)). It said: "If any such change in the law is to be made, it ought, in my view, to be made by the legislature, which is in a position to consider the full range of commercial interests at stake, rather than on the basis of the necessarily limited submissions of two parties to a lawsuit, and I would certainly not be prepared to take such a step in the present case".

4) One reason sometimes given for the traditional view that there is no duty to mitigate in these circumstances is that mitigation only applies to executory contracts, not executed ones. That is, consider the case of a contract for the supply of a particular good. Once the contract is executed and the goods delivered, there is as a practical matter no duty to mitigate because the property contracted for is in the possession of the transferee. Traditionally a lease has been viewed the same way, as an executed contract, with the goods - the right to exclusive possession for a term - passed on. But as Professor Weinrib points out, in fact the whole term has not been "executed", and in reality the lease is as much executory as it is executed: A. Weinrib, "Property, Precedent and Policy", (1985) 35 University of Toronto Law Journal 542 at 544-545.

CHAPTER TWELVE

RESIDENTIAL TENANCIES

A) INTRODUCTION

Since c. 1970 all Canadian jurisdictions have enacted separate statutory regimes for residential tenancies. These regimes vary from province to province. That of Ontario is now to be found in the Tenant Protection Act, S.O. 1997, c. 24, in force as of June 17, 1998. The Tenant Protection Act repeals the previous statute, Part IV of the Landlord and Tenant Act. The Tenant Protection Act is not the only statute that governs residential tenancies law in the province. There are other statutes directly relevant - notably the Human Rights Code which prohibits discrimination in the provision of accommodation. Before the introduction of the Tenant Protection Act there was also separate legislation dealing with rent review/control and with protection of the rental housing stock. These have been repealed also: Tenant Protection Act, ss. 218 and 219.

Residential tenancies law can obviously be set against the general background of some of the themes of this course - particularly the ideas that "property" is a bundle of rights and that the content of property regimes and the arguments supporting one or the other are matters of social choice. The current Ontario regime governing the rights and duties of landlords and tenants largely dates from 1970, when Part IV was added to the Landlord and Tenant Act, incorporating many of the recommendations of the Ontario Law Reform Commission's Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies (1968). The security of tenure provisions of Part IV were introduced in 1975, and are largely retained in the Tenant Protection Act. Rent control/review was first introduced at that time also, but has now been substantially modified (as discussed below).

The general thrust of the Tenant Protection Act, and of its predecessor Part IV of the Landlord and Tenant Act, is to make the conceptual basis of residential tenancies law different to that of commercial tenancies in two fundamental ways. First, while the commercial lease is still an estate, the residential lease is a contract for accommodation. Second, while the terms of the commercial lease are largely a matter for the parties, a residential contract for accommodation is in significant ways a regulated contract; the power of the parties to make their own terms is substantially curtailed.

These two broad conceptual changes should inform your reading of both the articles and statutory provisions reproduced immediately below. As you read, look also for arguments about, and evidence of, four general themes in the legislation:

1) The legislation imposes obligations on landlords unknown to the common law. See here particularly the repair and fitness for use provisions.

2) The legislation seeks to deal with the perceived "inequality of bargaining power" between landlords and tenants. See here the prohibition of "contracting out" and the elimination of landlords' "self-help" remedies.

3) The legislation seeks to include all (or almost all) forms of "residential accommodation". See here the various definition and exclusion sections and consider them in the context of earlier material on the distinction between leases and licenses.

4) The legislation provides substantial, though by no means complete, security of tenure. The grounds for termination of tenancies are not included in this part of the chapter, as they are dealt with in a later section. However, section C below does lay out the general scheme of the legislation.

One very important change introduced with the Tenant Protection Act is the establishment of the Ontario Rental Housing Tribunal to replace the court as the forum for adjudicating disputes. The Act states:

157 (1) A tribunal to be known as the Ontario Rental Housing Tribunal in English and Tribunal du logement de l'Ontario in French is hereby established.

(2) The Tribunal has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

162. The Tribunal has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act.

196 (1) Any person affected by an order of the Tribunal may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.

(2) A person appealing an order under this section shall give to the Tribunal any documents relating to the appeal.

(3) The Tribunal is entitled to be heard by counsel or otherwise upon the argument on any issue in an appeal.

(4) If an appeal is brought under this section, the Divisional Court shall hear and determine the appeal and may,

(a) affirm, rescind, amend or replace the decision or order; or

(b) remit the matter to the Tribunal with the opinion of the Divisional Court.

(5) The Divisional Court may also make any other order in relation to the matter that it considers proper and may make any order with respect to costs that it considers proper.

181 (1) The Tribunal may attempt to mediate a settlement of any matter that is the subject of an application if the parties consent to the mediation.

(2) Despite subsection 2(1) and subject to subsection (3), a settlement mediated under this section may contain provisions that contravene any provision under this Act.

197. The Tribunal is entitled to appeal a decision of the Divisional Court on an appeal of a Tribunal order as if the Tribunal were a party to the appeal.

This is not the first time that such a change has been legislated. In 1979 there was an attempt to introduce a major reform in the law through a new statute - the Residential Tenancies Act. This established a Residential Tenancy Commission and gave it jurisdiction to resolve landlord-tenant disputes. In Reference Re Residential Tenancies Act, [1981] 1 S.C.R. 714 the Supreme Court held that the granting of such jurisdiction contravened s. 96 of the B.N.A. Act and was thus invalid. The Commission was never constituted. It is likely that the Tenant Protection Act will be the subject of a similar constitutional challenge.

B) SECURITY OF TENURE AND RENT CONTROLS

As noted above, and as more fully detailed below, the Ontario legislation creates security of tenure for tenants. They may stay in their rented accommodation unless the landlord can invoke one of the reasons for termination of the tenancy. The first two articles reproduced below discuss why security of tenure is considered important, what justifies this reduction in the landlord's bundle of rights. Many people argue that security of tenure is only achievable in fact as well as law if it is accompanied by rent controls. Without them, landlords can effectively evict tenants through economic means - raise the rent until the tenant is forced out. And, of course, there are other reasons given to justify rent controls.

Before the enactment of the Tenant Protection Act Ontario had a fairly comprehensive rent control system, one that applied to all sitting tenants and to all existing buildings; only new buildings were initially exempted, and they were included once tenants had taken up residence. The new rent control scheme brought in by the Tenant Protection Act only controls rents for sitting tenants. Landlords are free to set whatever rents they want for new tenants. The third article below canvasses arguments for and against rent controls. It was written before the new legislation came into force, but remains a very useful summary of those arguments. Interestingly, in a section not reproduced here, Iacobucci proposes a scheme very similar to the one chosen by the Ontario government.

S. Makuch and A. Weinrib, Security of Tenure (Research Study No. 11, Ontario Commission of Inquiry into Residential Tenancies, 1985).

It was in 1970 that Ontario legislation, with amendments to the Landlord and Tenant Act, first dealt specially with residential tenancies.... The main effect of the 1970 amendments to the Landlord and Tenant Act was to bring about a revolution in residential landlord and tenant law that has taken place in other jurisdictions as well. There was a change from a property relationship on the part of the tenant to one closer to a contract between the landlord and tenant, but with the added benefit to tenants that the provisions of the Act could not be waived. The amendments not only introduced contract principles into residential tenancy relationships, but imposed a duty on the landlord to repair and maintain all rented premises; abolished security deposits for damages while permitting a deposit for the last month's rent; required the delivery of a copy of the tenancy agreement; abolished seizure of a tenant's goods; prohibited landlords or tenants from changing locks during occupancy without mutual consent; granted some protection from retaliatory eviction; and provided that a landlord could regain possession and evict only under court orders.

These amendments did not in themselves create security of tenure, but they supplied the framework for it and helped create a rationale for it. It can be argued that by moving the landlord and tenant relationship from its feudal origins and its preoccupation with proprietary interest to a modern basis in contract law, the legislation set the basis for a new security of tenure regime.

Even before overt security of tenure legislation tied to rent control was introduced, the Landlord and Tenant Act

Termination for "Tenant Faults": Illegal Activities

62. (1) A landlord may give a tenant notice of termination of the tenancy if the tenant commits an illegal act or carries on an illegal trade, business or occupation or permits a person to do so in the rental unit or the residential complex.

(2) A landlord may give a tenant notice of termination of the tenancy if the rental unit is a rental unit described in paragraph 1, 2 or 3 of subsection 5(1) and the tenant has knowingly and materially misrepresented his or her income or that of other members of his or her family occupying the rental unit.

(3) A notice of termination under this section shall,

(a) provide a termination date not earlier than the 20th day after the notice is given; and

(b) set out the grounds for termination.

88. If a landlord has a right to give a notice of termination under subsection 62(2), the landlord may apply to the Tribunal for an order for the payment of money the tenant would have been required to pay if the tenant had not misrepresented his or her income or that of other members of his or her family, so long as the application is made while the tenant is in possession of the rental unit.

Note here s. 73, which codifies a long-established rule:

73. The Tribunal may issue an order terminating a tenancy and evicting a tenant in an application ... based on a notice of termination under section 62 whether or not the tenant or other person has been convicted of an offence relating to an illegal act, trade, business or occupation.

Many of the reported cases on what is now s. 62 involve drugs, and the courts usually terminated tenancies as a result. There have been suggestions that there are constitutional problems with the current law on illegal activities and loss of shelter rights in public housing, but to date the courts have not heeded them: see M. Drumbl, "The State as Landlord: The Constitutionality of the Termination of Public Housing Leases on Account of a Tenant's Illegal Activities", (1996) 7 Windsor Review of Legal and Social Issues 75, and MTHA v. Smith (1989), 33 O.A.C. 349 (Div. Ct.). In Smith the MTHA sought to terminate the 10-year tenancy of Merleaner Smith, an unemployed single mother then attending school to upgrade her education to a grade 10 level. The reason for the application was that Smith's 24-year old son, Anthony Aransibia, who lived with her and her two other minor children, was trafficking in cocaine in the parking lots and roadways of the apartment building complex at Lawrence Heights. At the time of the application he was awaiting trial. There was no suggestion that Ms. Smith was in any way involved in the trafficking and she could not ask her son to leave because one of the conditions of his bail was that he not move. In an unreported judgment the trial judge allowed the application and held that: (a) Aransibia had committed an illegal act; (b) the illegal act had been committed on the residential premises, which involved common areas of the complex; and (c) Ms. Smith had "permitted" this act; she knew of it and was wilfully blind to it. Smith appealed to Divisional Court, which upheld

the termination. It rejected an argument that, where the landlord was relying on illegal acts carried on by a third party, an actual conviction should be required before the tenant could be evicted. It also briefly rejected an argument that, in these circumstances, termination of the tenancy represented a breach of Smith's s.7 right to security of the person. Moreover, even if it did constitute a violation, the court held that it was done consistently with the principles of fundamental justice.

Compare Smith with Re Metropolitan Toronto Housing Authority and Pennant (1991), 81 D.L.R. (4th) 404 (Ont. G.D.). Karen Pennant's apartment was searched by police and a loaded, restricted and stolen firearm discovered. In considering the application for a termination of the tenancy Corbett J. accepted Pennant's argument that the search warrant was invalid, but refused to exclude the evidence from the proceedings. He then found as a fact, on the civil standard, that Pennant had "permitted the unlawful act of possession of a prohibited weapon". However, he refused to grant the application for termination, stating at p. 412: "The tenant resides at the premises with her four-year-old son. She has no criminal record and there has been no previous difficulties with this tenant during her two-year tenancy. In these circumstances and since the overall case for the landlord was not compelling, I will not grant the writ of possession. For these reasons, the application will be dismissed upon condition that no hand-guns or firearms be permitted in, on, or at the subject premises at any time."